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No. ....

IN THE

Supreme Court of the United States

October Term, 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT; LOIS EWEN; HARRIET ALLEN; MILDRED BENIOFF; HANK DOERFLING; MARY HENDERSON; HELEN MCABOY; JUDY ROSENER; JOHN RUSH; NAOMI SCHWARTZ; LYNN SCHENK; and RICHARD GOLDEN, each individually and as members of the California Coastal Commission; MICHAEL FISCHER, individually and as Executive Director of the California Coastal Commission; CALIFORNIA COASTAL COMMISSION, an agency of the State of California; and THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented.

1. Where a state regulatory body "temporarily" and unlawfully prevents a property owner from putting his land to any lawful or reasonable use for years — all on the pretext that the delay was for the benefit of the public — does the "temporary" character of the taking insulate the state from liability for just compensation under the Fifth and Fourteenth Amendments?

2. *A fortiori*, where the state, through one of its counties, owns the fee interest in the land, and the property owner has only a sixty-year leasehold interest on which he must pay rent and taxes annually, so that the years of delay permanently and irretrievably deprive him of a part of the leasehold interest for which he is paying, has there been a *pro tanto* permanent taking of property entitling the property owner to just compensation?

3. Should the Court now address on the merits the issue of proper taking remedies, left open in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and again left open in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), and thereby resolve the nationwide disagreement now raging among state courts and among the circuits?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Interstate Marina Development Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

THE OPINION BELOW.

The Court of Appeals rendered its decision by Memorandum Opinion (unpublished), captioned *Interstate Marina Development Co.* v. *The State of California*, No. 81-5312.

JURISDICTION.

1. This is an action for just compensation in which Plaintiff-Petitioner contends that Defendants-Respondents (the State acting through its Coastal Commission, and certain officials thereof sued individually and in their official capacity) effected an uncompensated taking, and deprivation of Petitioner's property without due process of law.

2. The opinion below was filed on August 23, 1982. Petitioner's timely petition for rehearing was denied on October 12, 1982.

3. Jurisdiction of the U.S. District Court in which this action was brought was based on 28 U.S.C. §1331 and 28 U.S.C. §1343.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fifth Amendment, U.S. Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, U.S. Constitution:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983.

> "Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE.

Procedural Statement.

Petitioner seeks review of the affirmance of a District Court dismissal of its action against the California Coastal Commission and its members, seeking interim just compensation for a temporary taking of its entire leasehold, and a permanent *pro tanto* taking of the part of its 60-year leasehold that was irretrievably destroyed during the years of the regulatory taking.

STATEMENT OF FACTS.

Interstate Marina Development Co. (IMDC) is a limited partnership holding a 60-year lease on an approximately four-acre parcel in the Marina Del Rey area of Los Angeles County. The Marina Del Rey, a project of the County, has been intensively developed over the years and is well known as a complex of marinas and various water-oriented apartments, condominiums, hotels, restaurants, offices, and other businesses. It is, in short, a fully developed urban area, not some sort of environmentally fragile open land.

The land is owned in fee simple by the County of Los Angeles, a political subdivision of the State, and the IMDC lease requires that IMDC improve the subject property with hotels, apartments, restaurants and other facilities designed to maximize the return from the land. This return-empha-

sizing feature was inserted into the lease at the County's insistence. Under the lease, and throughout the events that gave rise to this action, *IMDC has been required to pay rent to the County, and has been taxed on its leasehold based on such contemplated intensive, income-producing uses, even though for years IMDC was prevented from putting the subject property to any economically rational use whatsoever.*

In 1972, California adopted by initiative the Coastal Zone Convervation Act which imposed a number of regulatory requirements on land uses in the Coastal Zone, which includes Marina del Rey. After completing necessary preliminary work, IMDC applied for a coastal development permit in 1976, but the Regional Coastal Commission denied the application. The State Coastal Commission refused to hear IMDC's appeal.

Thereupon IMDC brought parallel actions against the Commission in state and federal courts.[1] At first, the U.S. District Court abstained because another entity (Marina Plaza — of which more presently) was in the process of litigating potentially dispositive state law issues. After the state courts ruled adversely to Marina Plaza (see *Marina Plaza* v. *California Coastal Zone Conservation Commission*, 73 Cal.App.3d 311, 140 Cal.Rptr. 725 (1977)), the District Court resumed exercise of its jurisdiction. IMDC then moved for partial summary judgment. After first resisting, the Commission stipulated that IMDC's permit application be remanded for reconsideration. This was ordered on December 15, 1978. The following month, the Regional Commission granted the permit application, but this was appealed by opponents of IMDC's project to the State

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[1]The defendants are hereafter collectively referred to as "the Commission," unless otherwise indicated.

Coastal Commission[2] which — sharp contrast with its earlier attitude, when IMDC was appealing a permit denial — found that when the appeal was pursued by IMDC's adversaries, there was after all a substantial issue, and set the matter for hearing.[3]

In the meantime, Marina Plaza, another entity, was still pursuing its permit application (an effort that began in 1973) to build an entirely different project in the Marina del Rey area. But, acting on the pretext that one of IMDC's general partners was also a partner in Marina Plaza, the Commission — over vehement objections of both IMDC and Marina Plaza — consolidated the two matters and heard one appeal for both projects.

The Commission then ostensibly granted both permits, but cynically made them subject to onerous conditions that rendered both permits illusory as a practical matter. Marina Plaza had applied for a 9-story, 300-room hotel, but it was "permitted" to build a 3 to 4 story, 75 to 100 room motel. And, evidently to make sure that Marina Plaza's project would be economically unviable, the Commission also required that Marina Plaza include a youth hostel, a public promenade, provide public recreational vehicle hookups, and provide public bicycle racks. Then, to drive the last nail into Marina Plaza's economic coffin, the Commission decreed that Marina Plaza could charge no more than $20 per night per room, *and* that its restaurant charges be comparable to those of such large-scale, low-cost chain oper-

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[2]Under California's peculiar practice, virtually anybody can appear in Commission proceedings and appeal a Regional Commission determination, but the state Commission hears such appeals only if it first decides that there is a substantial issue.

[3]The attitude of the Commission toward private landowners, and the California state courts' unduly indulgent attitude toward the Commission, may be gleaned from Berger, *You Can't Win Them All — Or Can You?*, 54 Cal. State Bar Journal 16 (1979).

ations as Sambo's or Denny's (a level totally incompatible with any quality hotel operation).

The reason why this blatant mistreatment of Marina Plaza is pertinent, is that the Commission then conditioned IMDC's permit on the economically ridiculous Marina Plaza project being built first, and on the posting by IMDC of a "construction bond"[4] to ensure the completion of the *Marina Plaza project* in accordance with that permit.

It was the Commission's avowed intention, evident from its findings, to require IMDC to subsidize the youth-hostel and other low-cost, public service features they had imposed on the Marina Plaza project, in order to get permission to build its own project.

IMDC amended its complaint to allege the above events, and filed a parallel action in the state Superior Court to set aside the conditions. The state court entered judgment in IMDC's favor to the extent of issuing a writ of mandate, but denied any monetary relief under the complusion of *Agins* v. *Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P. 2d 25 (1979), aff'd. on other grounds, 447 U.S. 255 (1980).

Since then, the Commission has replaced most of the conditions objected to with ones that IMDC can live with. There is thus no further non-monetary relief that is appropriate. The only question left is whether IMDC is entitled to recover just compensation for this complete deprivation of its property for the years consumed while the Commission went through its various unlawful maneuvers. To that extent, Petitioner has suffered grievous losses and years of

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[4]Such a bond, which even in theory would be enormously expensive could not in reality be obtained at all because it would create liability in IMDC for the construction of Marina Plaza, and no bonding company in its right mind would underwrite such an uncontrollable liability of one entity for the acts or omissions of another.

delay, but has been left with no remedy, unless this Court grants relief.

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

The aftermath of this Court's decision in *Agins* v. *Tiburon*, 447 U.S. 255 (1980), and *San Diego G. & E. Co.* v. *City of San Diego*, 450 U.S. 621 (1981), in which the Court declined to deal with the issue of remedies for regulatory takings, has been a veritable maelstrom of litigation throughout the nation, with conflicting and utterly irreconcilable results, remedies and legal theories.

While the Constitution purports to protect private property against takings, it is a matter of common knowledge that zealous local officials, with an ear cocked to their influential (usually affluent suburbanite) environmentalist constituency, are using onerous regulations, complex regulatory procedures and, above all, delay, to acquire *de facto* various interests in the ostensibly "regulated" land. Until and unless this Court speaks out on this issue with clarity, such large-scale subversion of the constitutional protection is certain to go on. The belief that no damages are payable for abuse of private property rights is viewed — often quite cynically — by local officials (who would rather not have to spend public money) as a basis for taking a risk-free shot at stultifying private property rights and grinding down their owners with enormously costly delay, huge losses, and litigation expenses.

This case provides the Court with an opportunity to address a limited facet of the "taking issue:" *i.e.*, whether a temporary regulatory taking invokes the guarantee of the Taking Clause and requires payment of just compensation. This case provides the Court with an unusually clear and egregious example of how *de facto* confiscation can disguise itself as "regulation," and how ostensibly "temporary" interference with property rights, in the case of a lessee, *de*

facto deprives him totally and permanently of a significant portion of his leasehold for which he is forced to pay rent and taxes by the very government that denies him any use of it. This case offers the Court a unique opportunity to continue its case-by-case approach toward systematizing the law of takings so as to create a body of guiding precedent.

Beyond Petitioner's plight, it is doubtful whether there has ever been a serious issue of constitutional law that has so sharply divided the country's judiciary, and simultaneously left it so bereft of authoritative guidance from this court. Remedial intervention by this Court is urgently needed; it is a matter of serious national priority.

I.

THERE IS A VACUUM OF GUIDING PRINCIPLE IN THE LAW OF REGULATORY TAKINGS, THAT NEEDS THE COURT'S ATTENTION.

A. The Country Desperately Needs This Court's Guidance As to Where Flexibility Ends and Precedent Begins.

The avowedly *ad hoc*, case-by-case approach to issues of non-physical takings, favored by the Court thus far (see *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 123-24 (1978)) has with the passage of time led to situations where predictability has been sacrificed to flexibility to such an extent that neither private nor public parties across the Nation are able to ascertain what their rights are without first litigating through the highest appellate levels. Even then, the results are chaotic.[5]

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[5]This is the prevailing view among scholars of the first rank; see commentaries collected in *San Diego G. & E. Co.* v. *City of San Diego*, 450 U.S. 621, 649, fn. 15. To those commentaries there should also be added the scathing assessment of Prof. Arvo Van Alstyne, another leading scholar in this field, that "with some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning and empty rhetoric." *Van Alystyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 2 (1970).

The relatively infrequent decisions of the Court in this field, combined with the avowed *ad hoc* nature of judicial inquiries, merely provide incentives to further litigation, as both sides to this durable conflict press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each individual dispute. "Even the modicum or predictability which might otherwise inhere in the pattern of judicial precedents is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts." Van Alstyne, *supra*, fn. 6, at 2-3.

The case at bench is a good example. Here, the conduct of the defendants was unlawful, as eventually determined by the state courts. Yet that unlawful conduct irretrievably took a substantial part of Petitioner's leasehold; the entire property was rendered totally useless *for years*. As more fully discussed *infra*, the Sixth Circuit considered this very issue (whether such *temporary* unlawful deprivations of the use of one's property give rise to valid claims under the Fourteenth Amendment and 42 U.S.C. §1983), and concluded that they do; see *Gordon* v. *City of Warren*, 579 F. 2d 386 (6th Cir. 1978). Yet in the case at bench the Ninth Circuit casually dismissed that very same claim *because* the taking was "only temporary,"[6] thereby assuming away the central constitutional issue and creating conflict with the Sixth Circuit.

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[6]The court below evidently confused the temporary decline in value resulting from announced, and then abandoned, condemnation plans, (a situation which leaves the fee simple title landowner in a position to use his land as values return to normal and his ownership continues undiminished), with a temporary taking of a portion of a leasehold that prevents the lessee from using his entire leasehold for years, thereby irretrievably depriving him *pro tanto* of his leasehold.

B. There Is Outright Conflict Between Circuits on the Issue of Temporary Regulatory Takings.

The present situation is wasteful of public and private resources, and has inspired positively chaotic conditions, and outright conflict between Circuits. Thus, the Sixth Circuit holds that a temporary deprivation of use of private land by local regulations eventually held invalid in state court proceedings, is a compensable temporary taking. *Gordon* v. *City of Warren, supra,* 579 F. 2d 386 (6th Cir. 1978); accord *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 707 (D.N.J. 1976).

But in the case at bench the Ninth Circuit, without analysis or reference to authority, simply brushed aside this important issue[7] with a casual statement that the ". . . deprivation was *only* temporary . . ." (Slip opinion, p. 5, Appendix A, p. 4, emphasis added).

So far Petitioner has been deprived of all use, value and return of its land *for seven years*. Can that be "only" temporary? *A fortiori*, since Petitioner's interest was, to begin with, a leasehold, can an unlawful *pro tanto* destruction of it, so that part of it is irretrievably gone, be dismissed as "only" temporary?[8] But aside from such semantic dispar-

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[7]The results reached by the Sixth Circuit have also been the law in a number of states; see *Lomarch Corp.* v. *Englewood*, 237 A. 2d 41 (N.J. 1968); *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd. 389 N.Y.S. 2d 895 (App. Div. 1976), rev'd and remanded, 45 N.Y. 2d 894, 383 N.E. 2d 560 (N.Y. 1978); *City of Austin* v. *Teague*, 570 S.W. 2d 389 (Tex. 1978).

[8]With all due respect, the Court below evidently forgot that the law of "just compensation" applies to temporary as well as permanent takings. In the temporary takings of World War II this Court repeatedly held just compensation payable. Some of the landmark World War II decisions of this Court arose from cases where the taking (including that of a leasehold) was admittedly temporary. See *U.S.* v. *General Motors Corp.*, 323 U.S. 373 (1945), *Kimball Laundry Co.* v. *U.S.*, 338 U.S. 1 (1949). As these two cases demonstrate, the measure of compensation in temporary takings may be, if anything, greater than in a permanent taking of fee simple title. It should be remembered that World War II only lasted three-and-a-half years. Here, Petitioner's property has been taken for some seven years.

agement and even on the Court of Appeals' erroneous premise, the government can no more commandeer private property temporarily than permanently (see *e.g.*, *Smith* v. *U.S.*, 458 F. 2d 1231 (9th Cir. 1972).[9] The same is true of regulatory takings; *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 653-654 (Brennan, J., dissenting from dismissal of appeal, but on the issue of remedies intimating the views of five members of this Court — see Rehnquist, J., concurring, 450 U.S. at 633).

II.

THE TAKING CRITERIA OF *PENN CENTRAL* HAVE BEEN SATISFIED IN THE CASE AT BENCH.

In *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124, this Court set up the factors of "particular significance" in determining whether a taking has occurred. All of these are present at bench.

> *First*, "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." 438 U.S. at 124
>
> Here, the impact on the claimant has been total: for most of a decade, the claimant has been completely deprived of all use, or return on his leasehold. Unlike diminution of value (which may eventually be undone by a rising market) the Petitioner's status as lessee makes the injury completely irreversible; nearly one-sixth of its ownership is completely gone. During that time, moreover, the state (acting through its political subdivision, the County) continued to exact a heavy investment from Petitioner, by insisting that Petitioner

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[9]The "taking" for which just compensation must be paid is the deprivation of the owner of his property interest, and does not depend on accretion of any right to the taker. *U.S.* v. *General Motors Corp.*, *supra*, 323 U.S. at 377-378.

pay rents and taxes on his leasehold, even as he was being prevented unlawfully from putting the leased land to any use whatever, and even as his leasehold period was irretrievably ticking away.

As Mr. Justice Brennan put it in *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 657:

"The fact that a regulatory 'taking' may be tem porary, by virtue of the government's power to rescind or amend the regulations, does not make it any less of a constitutional 'taking'."

Second, while the invasion of property rights here was not physical, it was also not a case of ". . . adjusting the benefits and burdens of economic life to promote the common good." (cf. 438 U.S. at 124) Here, the "regulation" was a mere pretext, and was eventually held unlawful by the state courts whose rulings were acceded to by the Coastal Commission. Yet, this pretended pursuit of the public good was the ostensible rationale for depriving Petitioner of all use of all its property for years.

Third, Petitioner's leasehold interest is unquestionably a constitutionally protected property right (cf. 438 U.S. at 124-125).

Fourth, the gravamen of Petitioner's case is that it was deprived of *all* reasonable, economically viable uses of its property while Respondents went on with their unlawful "regulation"; *i.e.*, Petitioner was not merely prevented from using its property for some particular use (cf. 438 U.S. at 125), but for *any* economically viable uses (see particularly the Court's discussion at 438 U.S. at 127-128 concerning the implications of *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962) and of *Armstrong* v. *U.S.*, 364 U.S. 40 (1960)). As a result, about one-eighth of Petitioner's leasehold is gone forever. Beyond that, Petitioner was required to pay taxes and rent to the very government which prevented it from using the property at all.

Finally, in contrast with *Penn Central*, here a state tribunal concluded that this "regulation" was unlawful (cf. 438 U.S. at 125).

In sum, all the earmarks of a regulatory taking under *Penn Central* are present here. The court below denied relief solely because of its mistaken view that private property may be taken without compensation if that is done "only temporarily." That, conclusion, however, is conceptually in error,[10] it creates direct conflict with *Gordon* v. *City of Warren*, *supra*, and disregards a long line of this Court's decisions holding that just compensation must be paid for temporary takings.

III.

APART FROM THE TAKING ISSUE, THE COMPENSATION ISSUE HAS PRODUCED A WELTER OF CONFLICTING AND IRRECONCILABLE APPROACHES AMONG STATE AND FEDERAL COURTS, ALL CLAIMING TO CONSTRUE THE "JUST COMPENSATION" CLAUSE OF THE FIFTH AMENDMENT, QUARRELING WITH ONE ANOTHER AND SOME SIMPLY DEFYING THIS COURT.

A. When Deciding Questions of Remedies for Uncompensated Takings, This Court Has for the Past Half-Century Consistently Opted for Compensation as the Proper Remedy.

There is little that can be added to the above subheading; this Court's decisions speak for themselves. See *Hurley* v. *Kincaid*, 285 U.S. 95 (1932); *Dugan* v. *Rank*, 372 U.S.

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[10]Even a casual contemplation of the "bundle of sticks" concept of property, discloses at once that a number of important and valuable property rights (leaseholds, life estates, and options, to name but a few examples) are inherently temporary in their duration. The court below evidently did not reflect on the fact that its "only temporary" justification, for all practical purposes, amounts to a ruling that only deprivations of estates of indefinite duration (*e.g.*, fee simple absolute) can be the subject of a "taking," and other property interests can be snuffed out by the government without compensation. A large body of law dealing with temporary takings makes such a concept legally — to say nothing of ethically — impermissible; see 450 U.S. at 657-658. If the ruling below were sound, the government would have no need to pay for leases; it would instead take "only temporarily" and ignore its duty to pay just compensation.

609 (1963); *Fresno* v. *California*, 372 U.S. 627 (1963); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950); *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974); *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Dames & Moore* v. *Regan*, 453 U.S. 654, 689-690 (1981); *Loretto* v. *Teleprompter Manhattan CATV*, ... U.S. ..., 73 L. Ed. 2d 868, 886 [14], 102 S. Ct. ... (1982).

And yet, in spite of this clear and consistent line of the highest authority, definitively construing the remedial attributes of the Taking Clause, the pattern of the lower courts — state and federal — is simply chaotic.

B. The State Court Decisions on Remedies Cannot Be Organized Into Any Legal or Intellectual Pattern; They Are Irreconcilable With Decisions of This Court and With One Another.

At one end of the spectrum are the "absolutist" states which flatly refuse to permit awards of just compensation no matter how egregious the taking affected by harsh regulations. See *Agins* v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P. 2d 55 (1979), aff'd on other grounds, 447 U.S. 255 (1980); *Davis* v. *Pima County*, 590 P. 2d 459 (Ariz. App. 1978); *Wyoming Borough* v. *Wyco Realty Co.*, 440 A. 2d 696 (Pa. Cmwlth. 1981).

California, alas, in this legal area evidently means to live up to its general "far out" image; two decisions of its intermediate appellate court have gone *Agins* one better, and have for all practical purpose defied the Supremacy Clause by holding that notwithstanding the Federal Civil Rights Act's (42 U.S.C. §1983) express provision for monetary relief in an action at law (see *Lake Country Estates* v. *Tahoe Regional Planning Agency, supra*, 440 U.S. 391 (1979)), they mean to award no compensation even where

relief is sought under §1983. See *Gilliland* v. *County of Los Angeles*, 126 Cal. App. 3d 610, 617, 179 Cal. Rptr. 73, 78 (1981), holding *expressly* that notwithstanding 42 U.S.C. §1983, the California Supreme Court's *Agins* decision means that monetary relief under §1983 would be "inappropriate."[11] Even more egregious is the companion case of *Gilliland* v. *City of Palmdale*, 179 Cal. Rptr. 627 (1981). In the latter case, the California Court of Appeal analyzed pertinent law, and coincidentally using Justice Brennan's exact words in *San Diego Gas & Electric Co.* v. *City of San Diego, supra*, 450 U.S. at 651, concluded that "California's position flatly contradicts clear precedent of United States Supreme Court cases," 179 Cal. Rptr. at 631. However, the California Supreme Court, instead of addressing this troublesome issue[12] ordered this *Gilliland* opinion not

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[11]"In view of that [*Agins*] decision, the remedy of monetary damages would be unavailable in any event, *whether the action were brought in inverse conmdemnation or under the Federal Civil Rights Act.*" (126 Cal. App. 3d at 617, 179 Cal. Rptr. at 78, emphasis added.) This simply defies this Court's views in *Testa* v. *Katt*, 330 U.S. 386 (1947) and in the *Second Employees' Liability Cases*, 223 U.S. 1 (1912), concerning the state courts' duty under the Federal Supremacy Clause to give effect to federal laws. With regard to monetary liability under §1983 for onerous land use regulations, see *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra.*

[12]By now the issue is acutely troublesome because the Ninth Circuit, in a recent opinion, expressly disagreed with the California *Agins* rule; see *In re Aircrash in Bali, etc.*, 684 F. 2d 1301, 1311, fn. 7, following Mr. Justice Brennan's views in *San Diego Gas & Electric*. In contrast, the opinion at bench (slip opinion, p. 5, Appendix A, p. 5.) disparages those views. Since California lies within the Ninth Circuit, one must thus conclude that governing federal constitutional law in the nation's most populous and litigious geographic area is dependent on which court tries the suit. Corrective action by this Court is urgently needed; see Rule 17(1)(b), Revised Rules of the Supreme Court of the United States.

to be published in the official reports, thereby censoring it out of California law.[13]

At the other end of the spectrum are what might be termed "strict construction" states which adhere to the position that the "just compensation" language of the Constitution(s) compels a monetary remedy; these jurisdictions generally reason along the lines articulated by this Court in *Hurley* v. *Kincaid, supra*, and its progeny. See *Village of Willoughby Hills* v. *Corrigan*, 278 N.E. 2d 658 (Ohio 1972), cert. den. sub. nom. *Chrongris* v. *Corrigan*, 409 U.S. 919 (1972), Douglas, J., dissenting (opinion); *Clifton* v. *Berry*, 259 S.E. 2d 35 (Ga. 1979). Two New England states recently endorsed this approach by dictum: *Milardo* v. *Coastal Resources Man. Council*, 434 A. 2d 266 (1982, R.I.); *Hamilton* v. *Conservation Comm'n.*, 425 N.E. 2d 358 (1981, Mass. App.).

Somewhere between these two polarized views are what one might call the "flexible approach" states. These jurisdictions either:

> a) Allow both specific relief and monetary damages to the extent losses are shown: *City of Austin* v. *Teague*, 570 S.W. 389 (Tex. 1978); *Ventures in Property I* v. *City of Wichita*, 594 P. 2d 671 (Kan. 1979); *Brazil* v. *City of Auburn*, 598 P. 2d 1 (Wash. App. 1979); Also see, *Sheer* v. *Township of Evesham*, 445 A. 2d 46 (N.J. Super. 1982), or

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[13]The California Supreme Court wields the plenary power simply to order the State Reporter of Decisions not to publish a Court of Appeal opinion in the official reports, thereby — in the words of California's premier legal commentator — ". . . taking it out of the class of citable precedent . . .", Witkin, *Manual on Appellate Court Opinions*, (West, 1977), at p. 35. Thus, although this opinion was originally published in the official California advance sheets at 127 Cal. App. 3d 386, it now appears only in the "unofficial" reports at 179 Cal. Rptr. 617.

b) Express a preference for specific relief (*i.e.*, invalidation of the harsh regulation), but with the proviso that in circumstances where specific relief is not effective, damages are to be awarded. See, *Hermanson* v. *Board of Comm'rs.*, 595 P. 2d 694 (Colo. App. 1979); *Kraft* v. *Malone*, 313 N.W. 2d 758 (N.D.), *Moviematic Industries, Inc.* v. *Dade County*, 349 So. 2d 667, 672 (Fla. App. 1977)[14]

c) Then there is New York whose law defies classification. On the one hand New York purports to hold that invalidation is the only remedy, unless there has been physical invasion or direct legal control of the affected property, or where the injury suffered is irreversible. *Fred F. French Investing Co.* v. *City of New York*, 39 N.Y. 2d 587, 350 N.E. 2d 381 (N.Y. 1976). Yet, on the other hand, New York has steadfastly refused to compensate even in the face of physical invasion (see, *New York Telephone Co.* v. *North Hempstead*, ... N.Y. 2d ...., 363 N.E. 2d 694 (N.Y. 1977), *Loretto* v. *Teleprompter Manhattan CATV, supra*, 53 N.Y. 2d 124, 423 N.E. 2d 320, reversed, ... U.S. ...., 73 L.Ed. 2d 868 (1982)) or irreversible injury (see, *Charles* v. *Diamond*, 41 N.Y. 2d 318, 360 N.E. 2d 1295 (N.Y. 1977)).

To confound New York's law even further, while the above case law was being decided, the courts of New York routinely awarded damages for interim losses due to temporary *de facto* taking effected by a harsh regulation in *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd 389 N.Y.S. 2d 895 (App. Div. 1976), rev'd and remanded, 45 N.Y. 2d 894, 383 N.E. 2d 560 (1978).

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[14]In spite of the dictum at the end of the *Moviematic* opinion, there are inconsistencies in Florida law; compare *Mailman Dev. Corp.* v. *Hollywood*, 286 So. 2d 614 (Fla. App. 1973), with *Askew* v. *Gables-by-the-Sea*, 333 So. 2d 56 (Fla. App. 1976).

To add a contentious touch to this sea of inconsistency, some of these state courts go out of their way to disagree with one another; see *e.g.*, *Eck* v. *City of Bismarck*, 283 N.W. 2d 193 (N.D. 1979), disagreeing with the sweep of California's *Agins* decision, and particularly *Burrows* v. *City of Keene*, 432 A. 2d 15, 20 (N.H. 1981), where the new Hampshire Supreme Court expressly "reject[ed] out of hand" the California *Agins* approach because, *inter alia*, it is ". . . in violation of the Constitution of the United States . . ." (*Id.*)[15] Yet all these courts purport to be following the law and construing the same provision of the federal Constitution.

C. The Circuits Are in Conflict.

As noted, the Ninth and District of Columbia circuits have opted for monetary damages ("just compensation") as a remedy for takings. *In re Aircrash in Bali, etc.*, *supra*, 665 at 1311; *Persinger* v. *Islamic Republic of Iran*, *supra*, 690 F. 2d at 1024-1025. So has the Fifth: *Hernandez* v. *City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981), *Wheeler* v. *City of Pleasant Grove* (5th Cir. 1981), 644 F. 2d 99. So has the Seventh: *Devines* v. *Moier*, 665 F. 2d 758 (7th Cir. 1981). So has the Sixth: *Gordon* v. *City of Warren*, *supra*.

However, the First Circuit takes a diametrically opposite position, evidently choosing to follow the absolutist California *Agins* position, rejected by the other Circuits; see

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[15]This is also the view of the Ninth Circuit; *In re Aircrash in Bali, etc.*, *supra*, 684 F. 2d 1301, 1311, fn. 7 (9th Cir. 1982), where the court pointedly noted that California's *Agins* ruling does not appear to be the law.

Pamel Corp. v. *Puerto Rico Highway Authority*, 621 F. 2d 33, 35 (1st Cir. 1980).[16]

This Court's intervention is urgently needed, if nothing else, to let the federal trial bench know which rule to follow.

Petitioner respectfully urges that the prevailing situation thus invokes the criteria for this Court's intervention, set forth in Rule 17(1).

IV.

THE ELEVENTH AMENDMENT ISSUE ALLUDED TO IN THE COURT OF APPEAL OPINION IS NOT DISPOSITIVE BECAUSE THERE REMAIN INDIVIDUAL DEFENDANTS.

There is little to be added to the above heading. Even if the court below had considered the Eleventh Amendment issue (see Appendix A, p. 6.) and resolved it adversely to Petitioner,[17] that would not dispose of the case, as the question of liability of the individual defendants remains as a viable issue. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 319 (1979).

Accordingly, such issue presents no obstacle to this Court's determination of the taking/compensation issue

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[16]Thereby, the same conceptual anomaly now exists in New England as in California. New Hampshire is within the First Circuit, yet it interprets the Fifth Amendment's remedial aspects contrary to its federal circuit's view, albeit this conflict is the converse of California which disagrees with its [Ninth] Circuit. Manifestly both views cannot possibly be correct. This is intellectual chaos.

[17]While the Eleventh Amendment issue is not presented here for review, it should be noted in passing that California, by its Constitution (Art. I, §19) has consented to suit for takings of property: *Rose* v. *State of California*, 19 Cal. 3d 713, 722, 123 P. 2d 505 (1942), and that the rule of *Hans* v. *Louisiana*, 134 U.S. 1 (1890) is therefore inapplicable. Moreover, California Public Resources Code §30334(b) expressly provides that the Coastal Commission may, *inter alia*, be sued ". . . before *any court*, board or agency of the state or *federal government*", emphasis added. The waiver can thus hardly be more explicit.

which was viewed as dispositive by the Court below, and remains such now, wholly apart from any Eleventh Amendment issues.

CONCLUSION.

In the end, the idea articulated by this Court in *Lynch* v. *Household Finance Co.*, 405 U.S. 538, 552 (1972) says it all: not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other liberties protected by the Bill of Rights; "neither can having meaning without the other." A government that has it within its whim to strip citizens of their lawfully accumulated property, of their material well-being on which rests the day-to-day security of their families, has little need for overtly invading their other seemingly protected liberties. That is the teaching of logic and the verdict of history.

Substantive rights, even of constitutional dimension, have no meaning unless their theoretical beneficiaries can avail themselves of realistic remedies that make those rights a reality. To say, as did the Court below, that one may be prevented from using his leasehold for a eighth of its term, encompassing over a half-dozen years, and then be denied any relief because the outrage was "only temporary" is shocking. *A fortiori* this is so where delay is so often the wrongdoers' openly and cynicaly chosen means of subverting the very constitutional rights asserted by the victim (see *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 654-657, particularly fn. 22).

Both the equities of this factual situation and the urgent national need for clarification of the substantive and remedial aspects of this litigation-spawning "taking/compensation issue" (which is increasingly baffling even the ex-

perts, to say nothing of the bewildered trial bench and bar) cry out for intervention by this Court.

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Respectfully submitted.

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